Class Actions

by Thomas M. Byrne*
and Stacey McGavin Mohr**

The United States Supreme Court's landmark recalibration of class certification requirements in *Wal-Mart Stores, Inc. v. Dukes,*[1] together with its broad approbation of class action waivers in arbitration agreements in *AT&T Mobility LLC v. Concepcion,*[2] establishes 2011 as a watershed year in class action practice. During the year, the United States Court of Appeals for the Eleventh Circuit only began to deal with the ramifications of *Dukes* but addressed *Concepcion*'s impact directly.

I. ENTER *DUKES*

Dukes[3] tightened the criteria for class certification in all would-be federal class actions while confining Rule 23(b)(2)[4] class certification to cases in which essentially only declaratory or injunctive relief is sought. Justice Scalia's opinion for the Court, joined by four other Justices, invigorated the commonality requirement in Rule 23(a)(2)[5] that is applicable to all three types of federal class actions. The Court held that the ritual recital of common questions that is a staple of virtually every class action complaint is insufficient to establish commonality.[6] To

* Partner in the firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. University of Notre Dame (A.B., cum laude, 1978; J.D., magna cum laude, 1981). Law clerk to the Hon. Robert A. Ainsworth, Jr. of the United States Court of Appeals for the Fifth Circuit and to the Hon. Morey L. Sear of the United States District Court for the Eastern District of Louisiana. Member, State Bar of Georgia.

** Associate in the firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. Emory University (B.A., 2001), Duke University School of Law (J.D., magna cum laude, 2007). Law clerk to the Hon. Karen Nelson Moore of the United States Court of Appeals for the Sixth Circuit. Member, State Bar of Georgia.

1. 131 S. Ct. 2541 (2011).
2. 131 S. Ct. 1740 (2011).
3. 131 S. Ct. 2541 (2011).
4. FED. R. CIV. P. 23(b)(2).
5. FED. R. CIV. P. 23(a)(2).
6. *Dukes*, 131 S. Ct. at 2551.

satisfy the rule, the common questions instead must have the capacity to have common *answers*.[7] In a key passage, the Court explained:

> Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways–by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention–for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[8]

The Court also held that class certification often involves inquiries into the merits, as the Eleventh Circuit and most federal circuits had gradually come to recognize over the last decade.[9] In a footnote, the Court once and for all interred the argument, based on a quote from *Eisen v. Carlisle & Jacquelin*,[10] that inquiry into the merits is prohibited when considering class certification.[11] "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases."[12] The fact that the requisite rigorous analysis of class certification requirements will often "entail some overlap with the merits of the plaintiff's underlying claim . . . cannot be helped."[13]

---

7. *Id.* Linking common questions with common answers is an element of the commonality assessment under Georgia law. Carnett's, Inc. v. Hammond, 279 Ga. 125, 129, 610 S.E.2d 529, 532 (2005).

8. *Dukes*, 131 S. Ct. at 2551 (internal citation omitted).

9. *See, e.g., In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316–20 (3d Cir. 2009); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202–03 (2d Cir. 2008); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008); *see generally* Busby v. JRHBW Realty, Inc., 513 F.3d 1314 (11th Cir. 2008).

10. 417 U.S. 156 (1974).

11. *Dukes*, 131 S. Ct. at 2552 n.6 (quoting *Eisen*, 417 U.S. at 177).

12. *Id.*

13. *Id*. at 2551.

The Court also held, unanimously, that claims for monetary relief may not be certified under Rule 23(b)(2) if "each class member would be entitled to an individualized award of monetary damages."[14] The Court not only rejected the plaintiffs' argument that (b)(2) certification was appropriate because their claims for backpay did not "predominate" over their claims for injunctive and declaratory relief, but also spurned the suggestion that the relative "predominance" of various forms of relief was the relevant question *at all*.[15] The critical question, according to the Court, is whether relief sought in a (b)(2) action is "individualized."[16] The Court left open the possibility that monetary relief that was not "individualized" might be available to a (b)(2) class.[17]

Dukes is probably the Court's most significant class action decision since the inception of the modern class action. The Court's searching commonality analysis will likely recenter the focus of class certification arguments from Rule 23(b)[18] to Rule 23(a).[19] The Court's analysis, moreover, was more rigorous than the analysis of Rule 23(b)(3)'s "predominance" and "superiority" criteria found in many cases for money damages.[20] Consequently, many pre-*Dukes* cases will now be of questionable precedential utility. The Court's deep dive into the merits to determine whether there were any bona fide common issues is groundbreaking and will likely have wide ramifications beyond employment cases for years to come.

The degree of scrutiny to which expert testimony should be subjected at the class certification stage remains unsettled after *Dukes*, though the Supreme Court rather pointedly suggested that a full *Daubert*[21]-style evaluation is required.[22] The Court's skepticism is in accord with the United States Court of Appeals for the Seventh Circuit opinion in

---

14. *Id.* at 2557.

15. *Id.*

16. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

17. *See id.*

18. FED. R. CIV. P. 23(b).

19. FED. R. CIV. P. 23(a).

20. The Eleventh Circuit's most recent detailed treatment of the superiority and predominance analysis, which resembles in many respects the *Dukes* commonality analysis, came in *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Serv., Inc.*, 601 F.3d 1159 (11th Cir. 2010), which was discussed in last year's survey. *See* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 62 MERCER L. REV. 1107, 1107-12 (2011).

21. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

22. *Dukes*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . .") (citation omitted).

American Honda Motor Co. v. Allen,[23] which held that if an expert's report is critical to class certification, then the district court must rule on any *Daubert* challenge to the expert's qualifications or testimony prior to ruling on class certification.[24] The Eleventh Circuit turned to the issue in *Sher v. Raytheon Co.*[25] and agreed with *Allen* in an unpublished 2011 opinion.[26] *Sher* was an environmental contamination case in which the district court certified a class of affected property owners.[27] The Eleventh Circuit reversed, holding that the district court erred by insufficiently evaluating the conflicting expert opinions presented at the class certification stage.[28] The district court had acknowledged, but left unresolved, the conflicting expert testimony on determination of aggregate diminution-in-value damages, but the Eleventh Circuit held that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification."[29] The court of appeals chided the district court for having "side-stepped" the "[t]ough questions" on opinion evidence.[30] The court remanded the case for further proceedings without opining on the propriety of class certification.[31]

The expert testimony issue is now the subject of a split among the circuits. The United States Courts of Appeals for the Eighth and Third Circuits have held that a complete *Daubert* inquiry is not required at the class certification stage,[32] at odds with the Seventh and Eleventh Circuits. The Eighth Circuit's opinion is the subject of a pending petition for a writ of certiorari,[33] which will test whether the Supreme Court is ready to return so soon after *Dukes* to the rudiments of class certification procedure.

---

23. 600 F.3d 813 (7th Cir. 2010).
24. *Id.* at 817.
25. 419 F. App'x 887 (11th Cir. 2011). The court accepted the appeal under Federal Rule of Civil Procedure 23(f).
26. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").
27. 419 F. App'x at 889.
28. *Id.* at 890-91.
29. *Id.* at 891.
30. *Id*. (internal quotation marks omitted).
31. *Id.*
32. *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3378 (U.S. Dec. 15, 2011) (No. 11-740); Behrend v. Comcast Corp., 655 F.3d 182, 204 n.13 (3d Cir. 2011).
33. 80 U.S.L.W. 3378 (U.S. Dec. 15, 2011) (No. 11-740).

II. CLASS ACTIONS VS. ARBITRATION

Meanwhile, in *AT&T Mobility LLC v. Concepcion*,[34] the Supreme Court held that the Federal Arbitration Act (FAA)[35] preempts state contract law limitations on the enforceability of arbitration agreements.[36] In a 5-4 opinion by Justice Scalia, the Court ruled that California's *Discover Bank*[37] rule, which classified most arbitration waivers in consumer contracts as unconscionable, stood as an obstacle to a congressional purpose and was therefore preempted by the FAA.[38] *Discover Bank* interfered with the purpose of the FAA by essentially allowing any party to a consumer contract to demand a right to class arbitration as a prerequisite to enforcement of an arbitration provision.[39] The Court stated that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[40]

The Eleventh Circuit's first opportunity to apply *Concepcion* came in *Cruz v. Cingular Wireless, LLC*,[41] which dealt with the validity under Florida law of the same arbitration agreement at issue in *Concepcion*.[42] Prior to the decision in *Concepcion*, the district court in *Cruz* had granted defendant AT&T Mobility LLC's motion to dismiss and compel arbitration based on the arbitration agreement contained in AT&T's consumer contracts. The district court upheld the arbitration agreement after concluding that Florida law did not create a blanket prohibition on class action waivers and finding that the specific agreement at issue would preserve consumers' statutory remedies and right to attorneys' fees. *Concepcion* was decided while the plaintiffs' appeal was pending.[43]

Although the Eleventh Circuit discussed Florida law on the validity of class action waivers, it did not decide whether such a waiver would be allowed under Florida law.[44] Applying *Concepcion*, the court instead concluded that, to the extent the arbitration provision would be

---

34. 131 S. Ct. 1740 (2011).
35. 9 U.S.C. §§ 1-16 (2006).
36. *Concepcion*, 131 S. Ct. at 1756.
37. Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005).
38. *Concepcion*, 131 S. Ct. at 1753.
39. *Id.* at 1750.
40. *Id.* at 1748.
41. 648 F.3d 1205 (11th Cir. 2011). The opinion of the court was authored by Judge Stanley Marcus.
42. *See id*. at 1207.
43. *Id*. at 1206-07.
44. *Id*. at 1213 n.12.

unconscionable under Florida law, Florida law would be preempted by the FAA.[45] After reviewing *Concepcion*, the court rejected the argument that the class action waiver was unenforceable because it would exculpate AT&T from liability under state law and defeat the remedial purpose of the Florida Deceptive and Unfair Trade Practices Act:[46]

> However, the Court in *Concepcion* specifically rejected this public policy argument, which was expressly made by the dissent in that case: "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Thus, in light of *Concepcion*, state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims–including that the claims "predictably involve small amounts of damages," that the company's deceptive practices may be replicated across "large numbers of consumers," and that many potential claims may go unprosecuted unless they may be brought as a class–are preempted by the FAA, even if they may be "desirable."[47]

The court went on to explain that "to the extent that Florida law would be sympathetic to the Plaintiffs' arguments here, and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures," such a state policy would be preempted by the FAA.[48]

The court next addressed two attempts by the plaintiffs to distinguish *Concepcion*. First, the court quickly dispensed with the argument that *Concepcion* is concerned only with state laws that impose nonconsensual class *arbitration* on parties, as opposed to *litigation* required here under the agreement's "blow-up" provision, which would invalidate the arbitration agreement if the class-action waiver were inoperative.[49] The court rejected the incongruous proposition that the FAA would be offended by imposing non-consensual class procedures on arbitration but not by the elimination of arbitration altogether.[50] Further, the prospect of non-consensual class arbitration was not present in *Concepcion*, as it was already prohibited under *Stolt-Nielsen S.A. v. AnimalFeeds*

---

45. *Id*. at 1207.
46. FLA. STAT. §§ 501.201-501.213 (2011), *available at* http://www.leg.state.fl.us/statutes/.
47. *Cruz*, 648 F.3d at 1212 (citations omitted).
48. *Id*. at 1212-13.
49. *Id.* at 1213-14.
50. *Id.*

International Corp.,[51] and the arbitration agreement contained the same blow-up provision.[52]

The court spent considerably more time addressing the plaintiffs' argument based on differences between Florida and California law.[53] Unlike California's *Discover Bank* rule, the plaintiffs argued, Florida law does not invalidate class waivers in a generic category of cases but instead requires evidentiary proof regarding the ability of parties to vindicate their statutory rights in arbitration under the specific provision at issue.[54] Here, the plaintiffs had presented evidence in the form of affidavits from three Florida consumer law attorneys who attested that they would not represent consumers in individual claims against AT&T. This evidence, however, only substantiated the same public policy arguments rejected in *Concepcion*.[55] Even the rule advocated by the plaintiffs would preserve mandatory class actions for all "small but numerous" consumer class actions–a rule that, if adopted, would be preempted by the FAA.[56]

The Eleventh Circuit did leave open one major question: whether *Concepcion* allows for "the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action,"[57] a principle set out by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[58] and *Green Tree Financial Corp.-Alabama v. Randolph*.[59] The Eleventh Circuit concluded that it need not address the application of the vindication principle because the Supreme Court examined the same arbitration provision in *Concepcion* "and concluded that it did not produce such a result."[60] Although *Cruz* seems to indicate that the Eleventh Circuit will robustly apply *Concepcion* to enforce arbitration agreements,[61] the import of

---

51. 130 S. Ct. 1758 (2010).
52. *Cruz*, 648 F.3d at 1213-14.
53. *Id.* at 1214.
54. *Id*.
55. *Id*.
56. *Id*. at 1214-15.
57. *Id*. at 1215.
58. 473 U.S. 614, 636-37 (1985).
59. 531 U.S. 79, 90-91 (2000).
60. *Cruz*, 648 F.3d at 1215.
61. The impact of *Concepcion* may be illustrated by a comparison of *Cruz* with a pre-*Concepcion* opinion, also authored by Judge Marcus, that subsequently was vacated by the Supreme Court and remanded in light of *Concepcion*, *Gordon v. Branch Banking & Trust*, 419 F. App'x 920 (11th Cir. Mar. 28, 2011), *vacated*, 132 S. Ct. 577 (Nov. 14, 2011). In *Gordon*, the court concluded that a class-action waiver in a bank's consumer contract was unconscionable under Georgia law because arbitration would not provide a mechanism for

Cruz may be somewhat diluted by the fact that the provision at issue was identical to the *Concepcion* provision, potentially leaving open questions as to how the court may treat arbitration agreements with fewer consumer-friendly provisions. The enforcement of class-action waivers in arbitration agreements is likely to be heavily litigated in the coming year as plaintiffs probe *Concepcion* for limits.

The Eleventh Circuit offered still more latitude to parties seeking to enforce arbitration agreements in *Krinsk v. SunTrust Banks, Inc*.[62] The district court held that SunTrust had waived any contractual right to arbitrate the claims brought by Krinsk because it participated in the litigation for nine months prior to requesting that the case be submitted to arbitration.[63] Krinsk, a ninety-two-year-old woman, claimed that SunTrust had improperly suspended her home equity line of credit account as well as those of other Florida homeowners who had obtained similar accounts. SunTrust had requested updated financial information from the customers, which Krinsk contended was used as a pretext to suspend credit access to allow SunTrust to shore up its capital reserves.[64] Krinsk's claims included breach of contract, deceit, breach of fiduciary duty, violation of the Truth-in-Lending Act,[65] and breach of the implied covenant of good faith and fair dealing.[66] SunTrust moved to dismiss the case and proceeded with the discovery planning process. SunTrust's motion to dismiss was granted in part by the district court. When Krinsk amended her complaint in response to the dismissal order, she enlarged the alleged class significantly. SunTrust answered the complaint and then moved to compel arbitration.[67]

On review, the Eleventh Circuit explained that a party may waive a right to arbitrate by acting inconsistently with that right in a way that

---

the plaintiff to recoup arbitration costs, making it unlikely that prospective plaintiffs would be able to secure adequate representation. *Id*. at 923. The court distinguished its prior decision in *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010), on the basis that the plaintiff in that case was entitled to attorneys' fees and costs by statute. *Gordon*, 419 F. App'x at 924-25. After the Supreme Court's remand, the Eleventh Circuit remanded *Gordon* to the district court for further proceedings in light of *Concepcion*. *Gordon v. Branch Banking & Trust*, No. 09-15399, 2012 WL 265938 (11th Cir. Jan. 31, 2012). If *Gordon* returns to the Eleventh Circuit, it could present an opportunity for the court to further explore the contours of *Concepcion*.

62. 654 F.3d 1194 (11th Cir. 2011). The court's opinion was authored by Judge Gerald B. Tjoflat. *Id.* at 1196.

63. *Id.* at 1200. See S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) and its progeny for the circuit's law on arbitration waivers.

64. *Krinsk*, 654 F.3d at 1197.

65. 15 U.S.C. §§ 1601-1693(r) (2006 & Supp. IV 2011).

66. *Krinsk*, 654 F.3d at 1198.

67. *Id.* at 1198-99.

is prejudicial to the other party.[68] SunTrust argued on appeal that, even if it had initially waived arbitration by pursuing judicial process, the filing of the amended complaint had revived its right to arbitrate under the agreement with Krinsk. The court characterized the issue as one of first impression.[69] The court began with the premise that an amended complaint supersedes the original complaint and becomes the operative pleading and that a defendant is allowed to "plead anew" in response to an amended complaint.[70] Citing authority from other circuits, the court postulated that a defendant is permitted to rescind its earlier waiver of arbitration "only if it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims."[71] The court noted that minor changes in an original complaint would not trigger the renewed right to seek arbitration.[72] But the court deemed the amendment to Krinsk's complaint to expand greatly the potential scope of the litigation by eliminating the original class definition's limits on class members' age and reasons for credit suspensions and by expanding the class period from a matter of months to more than three years.[73] The court saw this as a "vast augmentation of the putative class."[74] The court termed Krinsk's amendment as unforeseeable to SunTrust and held that allowing SunTrust to amend was a matter of "plain fairness."[75]

Krinsk offers a narrow escape hatch to class action defendants who passed on their arbitration rights when the case law left open the risk of class arbitration, feared by many defendants because of limited appellate rights.[76] *Concepcion* and *Stolt-Nielsen* have largely abated that risk, leaving some defendants in pending class litigation wistful about what might have been if they had invoked arbitration earlier.

Not every 2011 arbitration decision involving class actions, however, favored the party seeking arbitration. In *Lawson v. Life of the South Insurance Co.*,[77] an insurer that issued credit life insurance covering a

---

68. *Id*. at 1200 (citing Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002)).

69. *Id.* at 1202.

70. *Id*.

71. *Id*.

72. *See id*. at 1203.

73. *Id.*

74. *Id*. at 1204.

75. *Id*.

76. The risk of class arbitration came to prominence after the divided decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which now seems limited to its facts.

77. 648 F.3d 1166 (11th Cir. 2011). The opinion of the court was authored by Judge Ed Carnes, with a concurring opinion by Judge William H. Pryor, Jr.

credit sale of a motor vehicle sought to enforce the arbitration provision found in the finance agreement entered into between the dealership and the buyers. The insurer was not a party to that agreement, which financed the credit life insurance premium. The finance agreement's arbitration provision included a bar on class arbitration.[78]

The Lawsons filed a nationwide class action in Georgia state court against the insurer which, under the Class Action Fairness Act,[79] removed the case successfully to federal district court.[80] The insurer argued that it was entitled to invoke the finance agreement's arbitration provision–even though it was not a party to that agreement–either because it was a third-party beneficiary of the arbitration provision or under the doctrine of equitable estoppel.

The Eleventh Circuit rejected both arguments.[81] The court noted that the finance agreement did not show on its face an intent to allow anyone other than the buyers, the car dealership, and the bank that acquired the finance contract to arbitrate a dispute.[82] The court held that an intention to benefit a third party on the face of the contract was required under Georgia law to assert third-party beneficiary rights.[83] Further, the doctrine of equitable estoppel was not available to the insurer to compel arbitration.[84] As the court gauged it, "That is not a bad argument, but it is not a good enough one to prevail."[85] The court noted that Georgia courts have applied equitable estoppel to allow non-signatories to arbitration agreements to assert their rights against signatories.[86] But the court reasoned that "[u]nder Georgia law, a plaintiff's claims must directly, not just indirectly, be based on the contract containing the arbitration clause in order for equitable estoppel to compel arbitration of those claims."[87] The court concluded that the finance agreement was not the legal basis for the claims against the insurance company.[88] Those claims instead were predicated on the refund of the unearned insurance premium upon early repayment of the insured debt, which was required under the credit life insurance policy

78. *Id.* at 1168-69.
79. 28 U.S.C. §§ 1711-1715 (2006).
80. *Lawson*, 648 F.3d at 1170.
81. *Id.* at 1171.
82. *Id.* at 1171-72.
83. *Id.* at 1171.
84. *Id.* at 1172.
85. *Id.*
86. *Id.*
87. *Id*.
88. *Id.* at 1173.

and applicable insurance law.[89] The court rejected the argument that the "but-for" relationship between the underlying transaction and the credit insurance policy alone was enough to invoke equitable estoppel.[90] The court pointed out that Georgia law prohibited an insurer from including an arbitration clause in any of its insurance contracts, though exactly how this provision figured in the majority's reasoning was unexplained.[91] Concurring separately, Judge Pryor opined that the insurer's equitable estoppel argument might just be meritorious under Georgia law but concluded that Georgia law's prohibition of mandatory arbitration of insurance disputes was controlling.[92]

In yet another decision on the enforcement of an arbitration agreement, the Eleventh Circuit examined the issue of subject matter jurisdiction over freestanding petitions to compel arbitration brought under section 4 of the FAA.[93] *Community State Bank v. Strong*[94] involved an action brought by a Georgia payday lender, along with its affiliates, and a South Dakota bank, seeking to compel arbitration of a borrower's claims arising out of his loan transaction, based on an agreement to arbitrate contained in the loan documents. The case has a somewhat convoluted procedural history, starting with a state court class action and culminating in multiple trips to the Eleventh Circuit panel and the en banc court. The plaintiff originally filed a putative class action in Georgia state court alleging violations of the Georgia usury statute and other Georgia laws. To avoid federal jurisdiction, the plaintiff named as defendants only the Georgia payday lender affiliates and not the South Dakota bank. After the Georgia defendants and the bank served the plaintiff with a notice of intent to arbitrate, which the plaintiff rejected, the Georgia defendants removed the state-court action to federal court. The Georgia defendants, together with the bank, then

---

89. *Id.*

90. *Id.* at 1174-75.

91. *Id.*

92. *Id.* at 1175-78 (Pryor, J., concurring).

93. Community State Bank v. Strong, 651 F.3d 1241, 1246 (11th Cir. 2011); 9 U.S.C. § 4 (2006). Section 4 provides in part that

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.

94. 651 F.3d 1241 (11th Cir. 2011). The opinion of the court was authored by Judge Stanley Marcus. *Id.* at 1246.

filed a separate petition under § 4 seeking to compel arbitration.[95] The petition based federal jurisdiction on the complete preemption doctrine, arguing that section 27(a) of the Federal Deposit Insurance Act[96] completely preempted the state-law claims.[97] The district court, however, disagreed, remanding the state-court action and dismissing the separate § 4 action for lack of jurisdiction.[98]

The case then began its trek through the Eleventh Circuit, which first reversed the dismissal of the petition, concluding that "looking through the § 4 arbitration petition to the underlying controversy," the plaintiff "could have filed a coercive action arising under federal law, and therefore the district court had federal jurisdiction over the petition to compel arbitration."[99] The court subsequently granted rehearing en banc,[100] but before an en banc decision was issued, review was stayed pending the Supreme Court's decision in *Vaden v. Discover Bank*,[101] which raised substantially similar jurisdictional issues under § 4.[102]

After *Vaden* was decided, the case was remanded to the original panel for further consideration.[103] Meanwhile, things had been progressing in the state-court action. After the Georgia defendants failed to comply with the state court's discovery orders, the state court sanctioned the defendants by striking their arbitration defenses,[104] leaving the Georgia defendants in a much different position than the South Dakota bank.

On remand, the Eleventh Circuit first considered the position of the bank and the effect of *Vaden* on the prior panel decision.[105] The court

---

95. *Id*. at 1248-50.

96. 12 U.S.C. § 1831d(a) (2006). The relevant portion of § 27(a) provides as follows:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, . . . charge on any loan . . . interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . whichever may be greater.

97. *Strong*, 651 F.3d at 1250-51.

98. *Id.* at 1251.

99. *Id*.

100. Cmty. State Bank v. Strong, 508 F.3d 576 (11th Cir. 2007).

101. 556 U.S. 49 (2009).

102. *Id.* at 57-58.

103. Cmty. State Bank v. Strong, 565 F.3d 1305 (11th Cir. 2009).

104. *Strong*, 651 F.3d at 1262.

105. *Id.* at 1253.

concluded that *Vaden* approved the "look through" approach previously used by the court for evaluating subject matter jurisdiction over a § 4 petition.[106] In *Vaden*, litigation already had been filed between the same parties to the § 4 petition. The Supreme Court concluded that, where the parties have already framed the claims by filing underlying litigation, the actual complaint must be considered as opposed to hypothetical claims that might have been made.[107] *Vaden* therefore did not address to what a court must "look through" where there has not yet been litigation filed involving the parties to the petition.[108] Based in large part on the opinion of Justice Roberts, concurring in part and dissenting in part, the Eleventh Circuit held that, where a complaint has not yet been filed against the party filing the § 4 petition, the court must look through the petition to hypothetical claims that could be brought in a coercive action against the petitioner.[109] To examine the "whole controversy" between the parties, the court should examine "pre-litigation or extra-legal communications between the parties" to reach the nature of the factual dispute.[110] Here, based on the facts as revealed through the § 4 petition and exhibits–the state-court complaint, the arbitration demand, and the response thereto–the court concluded that the plaintiff would have non-frivolous claims against the bank under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute,[111] providing subject-matter jurisdiction over the bank's petition.[112]

The court, however, found no subject matter jurisdiction over the petition as to the Georgia payday lender defendants.[113] Applying settled principles of res judicata and collateral estoppel, the court concluded that the state court's striking of the arbitration defense as a discovery sanction precluded the Georgia defendants from relitigating the issue of the arbitration agreement's enforceability.[114]

---

106. *Id*.
107. *Id*.
108. *Id.* at 1253-54.
109. *Id*. at 1255.
110. *Id*. at 1256 & n.11.
111. 18 U.S.C. §§ 1961-1968 (2006).
112. *Strong*, 651 F.3d at 1257-61.
113. *See id.* at 1271.
114. *Id*. at 1264-71.

III. DEFINING THE CLASS

The year also saw several decisions considering issues concerning class certification and class settlements. In *Fitzpatrick v. General Mills, Inc.*,[115] the Eleventh Circuit considered an interlocutory appeal of the certification of a Rule 23(b)(3)[116] class in an action brought under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[117] In a somewhat unusual turn, the court approved of the district court's predominance analysis but vacated and remanded with instructions to alter the class definition, concluding that "the class as certified is not consistent with the analysis of the law performed by the district court."[118]

The plaintiff in *Fitzpatrick* brought claims under the FDUTPA and for breach of warranty, alleging that General Mills and a subsidiary made false and misleading claims about the digestive health benefits of YoPlus yogurt.[119] The district court certified a class as to the FDUTPA claims, defined as "all persons who purchased YoPlus in the State of Florida to obtain its claimed digestive health benefit."[120] On appeal, the defendants argued that common issues did not predominate and that the district court abused its discretion in defining the class because the definition required individualized fact-finding.[121]

The court of appeals agreed with the district court's finding that common issues would predominate under Rule 23(b)(2),[122] in part because the FDUTPA does not require a showing of actual reliance by each plaintiff, but only a showing that the deceptive conduct would deceive an objectively reasonable consumer, which could be shown by common proof.[123] The court concluded, however, that the order could

---

115. 635 F.3d 1279 (11th Cir. 2011). The opinion of the court was authored by Senior Judge Peter T. Fay. *Id.* at 1280.

116. FED. R. CIV. P. 23(b)(3).

117. *Fitzpatrick*, 635 F.3d at 1280; FLA. STAT. §§ 501.201-501.213 (2011), *available at* http://www.leg.state.fl.us/statutes/.

118. *Fitzpatrick*, 635 F.3d at 1281.

119. *Id.* at 1280-81.

120. *Id*. at 1282 (internal quotation marks omitted).

121. *Id*. at 1280-81.

122. FED. R. CIV. P. 23(b)(2).

123. *Fitzpatrick*, 635 F.3d at 1282-83. The court revisited this aspect of *Fitzpatrick* in another putative class action brought under the FDUTPA, coming to a different conclusion on the predominance issue. In *Webber v. Esquire Deposition Services, LLC*, 439 F. App'x 849 (11th Cir. 2011) (per curiam), the court considered the district court's refusal to certify under Rule 23(b)(3) claims against court-reporting firms alleging that the firms' billing practices violated the FDUTPA and unjustly enriched the firms. Although, as explained in *Fitzpatrick*, the FDUTPA does not require individualized proof of subjective reliance, the

not stand because the district court's class definition was inconsistent with this analysis.[124] The court specifically took issue with the class definition's requirement that class members have purchased YoPlus "to obtain its claimed digestive health benefit," which would "take[] into account individual reliance on the digestive health claims."[125] The court vacated and remanded, essentially instructing the district court to redefine the class as "all persons who purchased YoPlus in the State of Florida."[126] On remand, the district court did just that, defining the class as "all persons who purchased Yo-Plus in the State of Florida until the date notice is first provided to the class,"[127] and did not revisit its predominance analysis under the new definition. The defendants were therefore left with a broader class than that originally certified, one likely to include class members who were not damaged by the allegedly misleading claims.

IV. CLASS SETTLEMENTS

The Eleventh Circuit also explored issues regarding the approval and preclusive effect of a class action settlement in a trio of entangled decisions arising from one underlying action, *Faught v. American Home Shield Corp.*[128] *Faught* was a nationwide consumer class action alleging that American Home Shield (AHS), a seller and administrator of service contracts for home systems and appliances, wrongfully denied customers' repair and replacement claims.[129] Before the Faughts filed their action in the Northern District of Alabama, however, a nationwide class action based on substantially identical claims had been brought in California state court by another set of plaintiffs, the Edlesons.[130] A settlement was reached in the *Edleson* action, which gave the class

---

district court did not abuse its discretion given the individualized factual and legal issues inherent in the "differences in the circumstances under which putative class members purchased transcripts from the court-reporting firms." *Webber*, 439 F. App'x at 851. As to the unjust enrichment claims, "'common questions will rarely, if ever, predominate' in an unjust enrichment claim." *Id*. (quoting Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1274 (11th Cir. 2009)).

124. *Fitzpatrick*, 635 F.3d at 1283.

125. *Id.* (internal quotation marks omitted).

126. *Id*. at 1283 n.1.

127. Order at 2, Fitzpatrick v. Gen. Mills, Inc., No. 0:09-cv-60412-PCH (S.D. Fla. Dec. 2, 2011), ECF No. 181 (internal quotation marks omitted).

128. Faught v. Am. Home Shield Corp. (*Faught I*), 660 F.3d 1289 (11th Cir. 2011) (per curiam); Faught v. Am. Home Shield Corp. (*Faught II*), 444 F. App'x 445 (11th Cir. 2011) (per curiam); Faught v. Am. Home Shield Corp. (*Faught III*), Nos. 10-12496, 10-12534, 10-12536, 2011 WL 7118832 (11th Cir. Oct. 31, 2011) (Dubina, C.J.).

129. *Faught I*, 660 F.3d at 1290.

130. *See Faught III*, 2011 WL 7118832, at *1-2.

members the right to resubmit their claims to a "Review Desk" run by AHS but provided no specific standards for adjudicating the claims.[131]

After the California court refused to approve the *Edleson* settlement, AHS reached a settlement with the Faughts, which included a similar Review Desk process but provided more specific guidelines for claims-handling and litigation incentives to ensure that AHS treated claimants fairly.[132] The Alabama district court issued a final judgment approving the settlement and permanently enjoining "[t]he Named Plaintiffs, all Class Members, their counsel and anyone claiming through or for the benefit of any of them" from commencing, continuing or otherwise participating in a suit asserting released claims against AHS.[133] The appeals that followed involved both claims by objectors to the settlement and attempts by the Edlesons, who opted out of the *Faught* settlement, to revive their class claims in the California action.[134]

After the settlement was approved, AHS made various attempts to prevent the Edlesons from continuing their action. Although the Edlesons initially represented to the Alabama district court that they would pursue their claims only on an individual basis, they then filed an amended complaint in California that asserted new but related causes of action purportedly brought on a class basis.[135] AHS then moved the district court for a permanent injunction against the Edlesons, arguing that the relief they sought would interfere with the court's jurisdiction and would be incompatible with the business practice changes agreed to in the *Faught* settlement.[136] After a hearing, the district court granted the motion, enjoining the Edlesons from pursuing "*any and all* representative aspects" of their action, including all requests for injunctive relief, but allowing them to pursue "purely individual claims for monetary relief."[137] The Eleventh Circuit reversed on appeal, not because the Edlesons had not violated the injunction in the final judgment, but because "[t]he district court abused its discretion by entering an injunction to enforce a judgment that already included an injunction entered under the All Writs Act."[138] The court reiterated the long-standing rule that "injunctions are enforced through the district court's

131. *Id.* at *2.
132. *Id*. at *3.
133. *Faught I*, 660 F.3d at 1291 (internal quotation marks omitted).
134. *See id*.
135. *See id.*
136. *Id.* at 1291-92.
137. *Id*. at 1292 (internal quotation marks omittted).
138. *Id*.

civil contempt power"[139] and instructed that AHS "should have moved the district court for an order to show cause why the Edlesons should not be held in contempt for violating the injunction against the prosecution of released claims."[140]

The Eleventh Circuit did, however, reaffirm the broad discretion of district courts in the approval of settlement terms. In *Faught II* and *Faught III*, the court considered appeals by objectors to various aspects of the approved settlement and affirmed the settlement in both cases.[141] While *Faught II* quickly disposed of an appeal by one set of objectors, concluding that the district court did not abuse its discretion in denying the objectors' request for an award of attorneys' fees and costs,[142] *Faught III* took a closer look at the objections made by four sets of objectors, one of which was represented by the same counsel as the Edlesons.[143] The objections considered in *Faught III* fell into three categories: reasonableness of the class notice; fairness of the settlement; and reasonableness of the attorneys' fees awarded to class counsel.[144] Each category was based at least in part on the theory that the approved settlement was substantially similar to the *Edleson* settlement, a contention repeatedly rejected by the court.[145]

As to notice, the court first rejected the objectors' contention that the notice should have informed class members of the reasons the *Edleson* settlement had been rejected:[146]

---

139. *Id*. at 1293 (quoting Thomas v. Blue Cross & Blue Shield Ass'n, 594 F.3d 823, 829 (11th Cir. 2010)). *Thomas*, which also addressed the preclusive effect of a class settlement, is discussed in last year's survey. *See* Byrne & Mohr, *supra* note 20, at 1120-22 & n.128. This year the court also revisited the preclusive effects of a prior class action in *Taylor v. R.J. Reynolds Tobacco Co.*, 441 F. App'x 664 (11th Cir. 2011) (per curiam). Last year's survey reviewed the court's decision in *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), which considered the preclusive effect of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), a decades-old tobacco case in which that court had decertified the class but left standing certain factual findings to be used offensively by class members, on individual actions subsequently filed by class members. *See* Byrne & Mohr, *supra* note 20, at 1122-24. This year, *Taylor* considered the argument of an individual plaintiff, who was not an *Engle* class member, that *Engle*'s res judicata effect tolled the applicable statute of limitations. 441 F. App'x at 665-66. The court rejected this argument in a short per curiam opinion, concluding that Florida's two-year statute of limitations for wrongful death actions precluded the plaintiff's claims. *Id*.

140. *Faught I*, 660 F.3d at 1293.

141. *Faught II*, 444 F. App'x at 446; *Faught III*, 2011 WL 7118832 at *1.

142. 444 F. App'x at 446.

143. 2011 WL 7118832 at *1.

144. *Id.* at *3.

145. *Id.*

146. *Id.* at *5.

> [W]hile it would be easy to point to any number of additional data points that could have been included in the notice, we conclude that the district court did not abuse its discretion in finding that the reference to the *Edleson* agreement and the other information [in the notice] provided reasonable notice under the circumstances.[147]

Considering the fairness of the settlement terms themselves, the court performed a detailed comparison of the two settlements, pointing to several additional provisions of the *Faught* settlement making it fairer than the *Edleson* settlement, such as requiring qualifications for Review Desk personnel, specific guidelines for claims adjudication, and "litigation kickers" giving AHS an incentive to properly settle claims through the Review Desk process.[148] The court also rejected the argument that the settlement would strip class members of their class rights under various state consumer protection laws–an argument echoing those made by plaintiffs in *Concepcion*,[149] *Cruz*,[150] and similar cases–noting that all class members were free to opt out and "still have the option of forgoing the Review Desk and filing an individual suit under their state consumer protections statutes."[151] Further, if class members did submit the claims to the Review Desk, they could receive the full value of their claims, not "mere pennies on the dollar."[152] The court similarly affirmed the attorneys' fees award, which consisted of a $1.5 million lump sum plus 25% of the monetary compensation received by class members through the Review Desk process.[153] The court approved of the district court's finding that, because 25% is generally accepted as reasonable in a common fund case, it should also be reasonable here.[154] As to the additional $1.5 million lump sum, the court agreed that this amount could reasonably be considered compensation for the value added to the settlement through changes to AHS's business practices and establishment of the "state of the art" Review Desk, non-monetary benefits to which the 25% was not applied.[155]

The *Faught* decisions reaffirm settled principles of the Eleventh Circuit regarding approval of settlements. The court has seldom been inclined to micromanage fee awards in settled cases. When it comes to

---

147. *Id*.
148. *Id.* at *5-7.
149. 131 S. Ct. 1740 (2011).
150. 648 F.3d 1205 (11th Cir. 2011).
151. *Faught III*, 2011 WL 7118832 at *7.
152. *Id*. (internal quotation marks omitted).
153. *Id.* at *8-9.
154. *Id.*
155. *Id*.

injunctions that apply to state-court proceedings, however, the court–animated by federalism concerns–will demand strict adherence to established procedures.[156]

156. Similar federalism concerns underlie the Supreme Court's recent decision in *Smith v. Bayer Corp.*, in which the Court held that a federal district court's injunction of a state court from considering a request for class certification exceeded the district court's authority under the relitigation exception to the Anti-Injunction Act (AIA), 28 U.S.C. § 2283 (2006). 131 S. Ct. 2368 (2011). The Court concluded that the district court's denial of a similar class-certification request by a different plaintiff did not preclude other plaintiffs from proceeding in state court. *Id.* It was unclear whether the certification issues in the state court were the same, and the state plaintiffs were neither parties to the federal suit nor covered by any exceptions to the rule against nonparty preclusion. *Id.* *Smith* is in accord with the Eleventh Circuit's earlier decision in *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233 (11th Cir. 2006), which was in conflict with the view of the United States Court of Appeals for the Seventh and Eighth Circuits, now overruled by *Smith*. *See Smith*, 131 S. Ct. at 2375 & n.4 (discussing circuit split). The year did, however, see the Eleventh Circuit affirm a district court's enjoining of a state-court action under the "necessary in aid of its jurisdiction" exception to the AIA. Winchester v. Florida Farm Bureau Equities Inc., 427 F. App'x 833, 836 (11th Cir. 2011) (internal quotation marks omitted). In *Winchester*, the court concluded that the exception applied where, pursuant to its final judgment retaining jurisdiction to enforce a class settlement agreement, the district court enjoined a state-court action filed by the plaintiffs against the same corporate defendants for alleged breaches of the settlement agreement. *Id.* at 837.